No. 09-1303

IN THE

Supreme Court of the United States

DON W. SMITH, *et ux.*,

Petitioners,

v.

MICHAEL R. McCARTHY,
Individually and in His Official Capacity as
Deputy Sheriff, Nelson County, Virginia, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS PAYNE, McCARTHY, BRIDGWATER, DIXON AND BRANTLEY

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TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iii
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	3
REASONS FOR DENYING THE PETITION	6
A. Petitioners Fail to State Compelling Reasons to Grant a Petition for Writ of Certiorari	6
B. Petitioners Cannot Successfully Challenge the Lower Court's Decision to Consider the Criminal Trial Transcript as it Was Petitioners Who Referenced it in the Complaint, Filed it with the Court and Gave Written Notice That They Intended to Rely upon it in Responding to the Motions to Dismiss.	7
C. Petitioners Misstate the Findings of the Courts below Regarding the Applicability of the Statute of Limitations to Petitioners' Conspiracy Claim.	8
D. Petitioners' Naked Assertions of Conspiracy Are Without Factual Support and Do Not Meet the Plausibility Standard Set Forth by this Court in *Ashcroft v. Iqbal*.	9

Contents

Page

E. The Fourth Circuit Correctly Held That Respondent Payne Enjoyed Absolute Immunity for Claims of Conspiring to Present False Testimony and for Withholding Exculpatory Evidence Prior to Trial. 11

CONCLUSION 12

TABLE OF CITED AUTHORITIES

Page

Cases

Ashcroft v. Iqbal,
129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) 9, 11

Carter v. Burch,
34 F.3d 257 (4th Cir. 1994) 11

Imbler v. Pachtman,
424 U.S. 409 (1976) 11

United States Constitution

Fourth Amendment 1, 3

Fifth Amendment 1

Sixth Amendment 1

Fourteenth Amendment 1

Statutes

42 U.S.C. § 1981 1

42 U.S.C. § 1983 ..... 1, 11

42 U.S.C. § 1985 1

Cited Authorities

Page

Rules

U.S. Sup. Ct. R. 10 ..... 6, 10, 11

U.S. Sup. Ct. R. 10(a) 6

U.S. Sup. Ct. R. 10(c) 6

U.S. Sup. Ct. R. 14(a) 3, 7

U.S. Sup. Ct. R. 14(h) 7

STATEMENT OF THE CASE

Petitioners filed a Complaint alleging violations of their civil rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution and under sections 42 U.S.C. § 1981, § 1983 and § 1985, arising out of their arrest and prosecution for misdemeanor charges. (Petitioners' Appendix "Pet'r App.", at 66a-103a). Petitioners named 10 defendants seeking $500,000.00 in compensatory damages and $30,000,000.00 in punitive damages. All Respondents filed motions to dismiss and memoranda in support. (Pet'r App. at 104a-109a). Petitioners' counsel also filed a Notice of Hearing in which he attached a copy of the transcript of the trial of August 2, 2006, and indicated that during oral argument he intended to rely upon that transcript in responding to Respondents' motions to dismiss. (Joint Appendix filed with the Fourth Circuit "J.A." at 187).

The District Court issued a memorandum opinion and final order granting the Respondents' motions to dismiss. (Pet'r App. at 19a-65a). Petitioners appealed to the Fourth Circuit Court of Appeals. Petitioners did not appeal that portion of the District Court's Order dismissing the 42 U.S. C. § 1981 and § 1985 claims, and dismissing the claims of monetary relief against Respondent Payne in his official capacity based upon Eleventh Amendment immunity. (*See* Pet'r App. at 15a).

The Fourth Circuit affirmed the dismissal of all claims. (Pet'r App. 1a-16a). Specifically, the Fourth Circuit found that (1) the District Court properly considered the trial transcript in ruling on the motions

to dismiss as it was the Petitioners' counsel who referenced the transcript in the Complaint and stated his intention to rely upon it in responding to the motions to dismiss; (2) Petitioners' claims of excessive force, violations of due process, illegal entry, illegal search and seizure relating to the February 16, 2006 arrest were time-barred[1]; (3) Petitioners' claims of conspiracy against all Respondents were conclusory and without factual support as there were no facts establishing a meeting of the minds; (4) Respondent Payne was entitled to absolute immunity from liability for damages for conspiring with police officers to present false testimony and for withholding exculpatory evidence prior to trial; (5) Petitioners' claims that Respondent Payne advised the officers to arrest them on fabricated charges on February 16, 2006, were conclusory and without factual support as there were no allegations that Respondent Payne knew about, gave advice regarding, or otherwise participated in the arrest and search[2]; and (6) State Respondents Rader and Kaine were entitled to qualified immunity for their decision not to prosecute law enforcement officers and that State Respondents Dion and McDonnell were entitled to absolute prosecutorial immunity for the same decision. (Pet'r App. 1a-16a).

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1. Contrary to the Petitioners' contention in their petition, the Fourth Circuit did NOT find that the claims of conspiracy were time barred. (Pet'r App. at 8a-9a).

2. The Fourth Circuit found in the alternative that such claims also were barred by the two year applicable statute of limitations. (Pet'r App. at 12a).

Petitioners do not challenge that the officers' entry onto the Petitioners' property did not violate the Fourth Amendment; instead, Petitioners merely argue that the officers violated the Petitioners' constitutional rights through their alleged malicious wounding and arrest of Petitioners following their entry onto the property. (Petition for Writ of Certiorari "Pet." at 13–17). Only the questions set out in the petition, or fairly included therein, will be considered by the Court. Sup. Ct. R. 14(a).

STATEMENT OF FACTS

The Nelson County Respondents[3]

This suit arose out of an incident on February 16, 2006 involving Deputy McCarthy of the Nelson County Sheriff's Department and Petitioners Don Smith and Donna Smith. On that day, McCarthy and Deputy Bridgwater went to the Smiths' property to determine whether Donna Smith's son, David Reier, was present there. (Pet'r App. at 74a-75a). The Sheriff's Department had received a *capias* for Reier's arrest. (Pet'r App. at 70a). McCarthy and Bridgwater were following up on reports that David Reier had been seen in the area driving a green truck. (Pet'r App. at 74a-75a).

The Complaint alleges that none of the houses or improvements or the ground surrounding them are visible from the road. (Pet'r App. at 69a). The officers

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3. The "Nelson County Respondents" are Michael R. McCarthy, Malcolm E. Bridgwater, John M. Dixon, II and Gary L. Brantley.

drove up the driveway where they found a green pickup truck parked next to the house. (Pet'r App. at 70a). While the officers were present on the property, Donna Smith returned to the property in a van. (Pet'r App. at 71a-72a).

McCarthy questioned Donna Smith about the whereabouts of her son. (Pet'r App. at 71a). McCarthy then attempted to look into the back of Donna Smith's van, but Donna Smith "maneuvered her body so as to place the same between McCarthy and the van's door with her back to McCarthy and her arms spread-eagled across the van in a protective position." (Pet'r App. at 72a). A physical altercation ensued. (Pet'r App. at 72a).

During the struggle, Don Smith arrived in his car. He grabbed McCarthy's shirt in an attempt to intervene. (Pet'r App. at 72a). Immediately following the altercation, both Donna Smith and Don Smith were arrested for obstruction of justice. (Pet'r App. at 72a-73a). Deputy Dixon and Sheriff Brantley then arrived on the scene. (Pet'r App. at 73a). The Complaint alleges that after the arrest, Bridgwater, McCarthy, Dixon, and Brantley spoke together out of the earshot of the Smiths and at times appeared to speak on cell phones. (Pet'r App. at 73a).

Petitioners allege that at the trial, Deputies McCarthy and Bridgwater provided false testimony. (Pet'r App. at 74a-77a). Petitioners allege that after hearing the evidence, the judge acquitted Don Smith, but convicted Donna Smith of obstruction of justice. (Pet'r App. at 77a). Donna Smith did not appeal her conviction. (Pet'r App. at 80a-81a). Petitioners allege a violation of their constitutional rights based upon these events.

Defendant Payne

Petitioners allege that they retained Bruce Tyler (who is also their attorney in this case) to represent them with respect to the two misdemeanor charges. (Pet'r App. at 73a-74a). Petitioners allege that on May 10, 2006, Respondent Phillip D. Payne, IV, who was acting in his capacity as the prosecuting attorney, gave Mr. Tyler "unsolicited" documents consisting of a "confidential supplement" and dispatch logs. (Pet'r App. at 73a-74a). Petitioners allege that approximately one week before the trial, which was scheduled on August 2, 2006, Mr. Tyler mailed letters dated July 25, 2006, requesting what he characterizes as exculpatory evidence.[4] (Pet'r App. at 74a). Petitioners complain that Mr. Tyler did not receive the names of those deputies prior to trial. (Pet'r App. at 74a). There are no allegations that Petitioners ever brought this issue to the attention of the trial judge during the Petitioners' trial for obstruction of justice.

There are no allegations in the Complaint, or in the attachments to the Complaint that Respondent Payne knew about, gave advice regarding, or otherwise

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4. The letter which was attached to the Complaint as Exhibit D (Pet'r App. at 92a-93a) actually asks for the names of the deputies who had been at the residence the night before the arrest and who had seen the green truck at a different location on the Smith's property. The Smiths claim that those deputies may have had knowledge that the truck located on the premises was registered to a Maryland man and not to Donna Smith's son, an issue which the Smiths claim was relevant to a determination of probable cause to be on the premises. (Pet'r App. at 74a).

participated in the Petitioners' arrest. Petitioners' counsel argues after the fact that he has "evidence" that Respondent Payne conspired with the officers on the day of the arrest, but no such evidence or allegation is set forth in the Complaint or its attachments.

REASONS FOR DENYING THE PETITION

A. Petitioners Fail to State Compelling Reasons to Grant a Petition for Writ of Certiorari.

This Court will grant a petition for a writ of certiorari only for compelling reasons. Sup. Ct. R. 10. The types of compelling reasons considered by this Court include: a dispute among the U.S. Courts of Appeals, a decision by a U.S. Court of Appeals that has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's supervisory power, or a U.S. Court of Appeals decides an important and unsettled question of federal law. Sup. Ct. R. 10(a), (c). Rarely is a petition for a writ of certiorari granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Sup. Ct. R. 10.

In this case, Petitioners do not point to any of the compelling reasons cited in Rule 10 to support their Petition for Writ of Certiorari. Instead, Petitioners merely argue that the Fourth Circuit misapplied what they repeatedly call "well established" federal law. (*See* Pet. at 5, 7; 12; *see also* Pet. at 17, 23–25). This is

the very type of reason that rarely serves as the basis for review by this Court.[5]

B. Petitioners Cannot Successfully Challenge the Lower Court's Decision to Consider the Criminal Trial Transcript as it Was Petitioners Who Referenced it in the Complaint, Filed it with the Court and Gave Written Notice That They Intended to Rely upon it in Responding to the Motions to Dismiss.

Petitioners assert that the District Court erred in considering the criminal trial transcript in determining the Respondents' Motions to Dismiss. However, this assertion is not a valid basis for granting a writ of certiorari, particularly since it was counsel for Petitioners who referenced the trial transcript in the Complaint, filed it with the court and gave written notice that he intended to rely upon it in responding to the

5. Moreover, under Rule 14, the questions presented should be short and should not be argumentative or repetitive, and the argument should be direct and concise. Sup. Ct. R. 14(a) and (h). In this case, Petitioners' brief is replete with argumentative and conclusory statements. Petitioners go so far as to call both the Fourth Circuit and the District Court "judicially dishonest," (Pet. at 10-11), and to call the Fourth's Circuit's decision "highly unethical." (Pet. at 10-11, i). Petitioners accuse the Fourth Circuit of "obviously intending" to shield the officers for their "egregious violation" of constitutional rights simply because the Fourth Circuit would not be bound by the Petitioners factually unsupported and ofttimes incredible conclusions. (Pet. at i). These kinds of statements and arguments are in violation of the Supreme Court rules and do not justify the granting of the petition for writ of certiorari.

motions to dismiss. The Fourth Circuit correctly found that the use of the transcript was proper, and that the Petitioners' challenge was barred:

> The Smiths cited to the trial transcript in their complaint, and their counsel filed a copy of the transcript with the District Court, citing his intention to rely upon it in argument on the motions to dismiss. As such, they cannot now justifiably complain about the District Court's consideration of the transcript in rendering its decision or on its reliance on the facts as determined in that proceeding.

(Pet'r App. at 7a).

In spite of having asked the District Court to consider that transcript, Petitioners nevertheless accuse the Fourth Circuit and the District Court of being judicially dishonest for relying upon the portions of the transcript that the Petitioners do not like. (Pet. at 9-12). This ground is nothing more than an assertion of an erroneous factual finding or the misapplication of a properly stated rule of law which rarely serves as a reason to grant a petition for writ of certiorari.

C. Petitioners Misstate the Findings of the Courts below Regarding the Applicability of the Statute of Limitations to Petitioners' Conspiracy Claim.

Petitioners state that the District Court and the Fourth Circuit erroneously held that the conspiracy claim was barred by the statute of limitations. To the contrary, the Fourth Circuit confirmed that only the Petitioners' claims of excessive force, violations of due

process, illegal entry, illegal search and seizure against individual defendants relating to the February 16, 2006 arrest were time-barred. The Fourth Circuit specifically stated that neither it nor the District Court included the conspiracy claims in its dismissal on statute of limitations grounds. (Pet'r App. at 8a-9a). Yet, two of Petitioners "questions presented" concern Petitioners' assertions that the lower courts erred in ruling that the statute of limitations barred the conspiracy claims. (Pet. at iii).

Regardless of Petitioners' perception of the lower courts' holdings, Petitioners' assertion is essentially one of a misapplication of a properly stated rule of law which rarely serves a reason for this Court to grant review.

D. Petitioners' Naked Assertions of Conspiracy Are Without Factual Support and Do Not Meet the Plausibility Standard Set Forth by this Court in *Ashcroft v. Iqbal*.

In determining the sufficiency of a complaint, Rule 8 requires that a plaintiff plead more than "unadorned, the-defendant-unlawfully-harmed-me-accusations." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-50, 173 L. Ed. 2d 868, 883-84 (2009). A pleading that offers labels or conclusions or a "formulaic recitation of the elements of a cause of action is insufficient. *Id.* The claim must be plausible on its face. *Id.* The complaint must contain more than a "sheer possibility." *Id.* Facts that are merely consistent with a defendant's liability fall short of the pleading standard. *Id.*

The Fourth Circuit properly concluded that any allegations of a conspiracy failed as a matter of law, because Petitioners failed to allege a meeting of the minds. (Pet'r App. at 10a). The Fourth Circuit noted that the Petitioners' conspiracy claim against the law enforcement officers was based solely on the allegation that those officers "conferred at times as an entire group and at times in smaller groups out of earshot of Petitioners and appeared at times to be talking on cell phones." (Pet'r App. at 10a). The Fourth Circuit found that this allegation did not sufficiently allege a "meeting of the minds," and thus could not survive a motion to dismiss. (Pet'r App. at 10a).

Likewise with the conspiracy claim against Respondent Payne, the Fourth Circuit held there were no specific allegation that Respondent Payne knew about, gave advice regarding, or otherwise participated in the arrest and search.(Pet'r App. at 12a). Petitioners point to the allegation that they observed officers on cell phones at the scene, then jump to the conclusion that the officers must be talking with Respondent Payne. These types of allegations are conclusory in nature and fall far short of meeting the plausibility standard set forth in *Iqbal*. Even if the Fourth Circuit made an error of fact or misapplied the law, such error does not constitute a compelling reason to justify this Court's review. *See* Sup. Ct. R. 10.

E. The Fourth Circuit Correctly Held That Respondent Payne Enjoyed Absolute Immunity for Claims of Conspiring to Present False Testimony and for Withholding Exculpatory Evidence Prior to Trial.

In initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under 42 U.S.C. § 1983. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976). Conspiring to present false testimony and failure to provide exculpatory evidence prior to trial clearly falls within the function of "initiating a prosecution and presenting the State's case." *Carter v. Burch*, 34 F.3d 257, 262-63 (4th Cir. 1994). With regard to the claims that Respondent Payne conspired and advised the police officers to arrest the Smiths on fabricated charges back on February 16, 2006, the Fourth Circuit found that Respondent Payne was entitled to qualified immunity only. (Pet'r App. at 12a). Nevertheless, the Fourth Circuit correctly held there were no specific allegation that Respondent Payne knew about, gave advice regarding, or otherwise participated in the arrest and search. (Pet'r App. at 12a). These types of allegations are conclusory in nature and fall far short of meeting the plausibility standard set forth in *Iqbal*. Even if the Fourth Circuit made an error of fact or misapplied the law as Petitioners suggest, such error does not constitute a compelling reason to justify review by this Court under Rule 10.[6]

6. With regard to the claims against the State Respondents, the Fourth Circuit correctly found that Rader and Kaine were entitled to qualified immunity for their decision not to prosecute law enforcement officers and Dion and McDonnell were entitled to absolute prosecutorial immunity for the same decision. (Pet'r App. at 13a-14a).

CONCLUSION

For the above reasons, Petitioners' Petition for Writ of Certiorari should be denied as Petitioners raise no compelling reason to grant the petition.

Respectfully submitted,

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